

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

| | | |
|---------------------------------------|---|-----------------------------------|
| SUE CANTRALL, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | Case number 4:11cv0655 TCM |
| |) | |
| BJC/HEALTHSOUTH |) | |
| REHABILITATION CENTER, L.L.C., |) | |
| |) | |
| Defendants. |) | |

MEMORANDUM AND ORDER

Pending before the Court¹ in this medical malpractice action is a motion filed by plaintiff, Sue Cantrall, to remand her case to the Circuit Court for St. Louis City, Missouri. [Doc. 6] Defendant, BJC/HealthSouth Rehabilitation Center, LLC (BJC), removed the action to federal court on the grounds of diversity of citizenship. Specifically, Plaintiff is an Illinois resident; BJC is a Missouri citizen; the amount in controversy exceeds \$75,000.00. See 28 U.S.C. § 1332(a) (granting original jurisdiction to district courts in cases in which, inter alia, parties are of different states and the amount in controversy exceeds sum of \$75,000).

Plaintiff alleges in her complaint that she is the widow of David Cantrall, who died as a proximate result of BJC's "carelessness and negligence and deviations from appropriate standards of rehabilitation and nursing care" (Compl. ¶ 4.)

¹The case is before the undersigned United States Magistrate Judge by written consent of the parties. See 28 U.S.C. § 636(c).

In her motion to remand, Plaintiff argues that remand is appropriate under 28 U.S.C.

§ 1441(b).

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. *Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.*

28 U.S.C. § 1441(b) (emphasis added). The action was filed in Missouri; BJC is a citizen of Missouri.

BJC does not oppose the remand, but does oppose Plaintiff's request for costs and attorney's fees.

Discussion

A defendant may remove a civil action filed in a state court to the proper district court if the district courts have original jurisdiction of the action. 28 U.S.C. § 1441(a). District courts have original jurisdiction in all civil actions between citizens of different states, if the amount in controversy exceeds \$75,000.00. 28 U.S.C. § 1332(a)(1). Here, there is no dispute that the two parties are citizens of different states and that the amount in controversy exceeds \$75,000.00. If Plaintiff had filed this lawsuit here, this Court would have had subject matter jurisdiction over her claims. She did not; she filed her lawsuit in state court.

As noted above, the removal statute provides, in relevant part, that actions within a district court's diversity jurisdiction may only be removed from state court to a federal court when none of the parties who have been joined and served as defendants is a citizen of the state in which such action is brought. 28 U.S.C. § 1441(b). In this Circuit, removing a case

within a district court's diversity jurisdiction to federal court when a defendant is a citizen of the forum state is a jurisdictional defect. **Horton v. Conklin**, 431 F.3d 602, 605 (8th Cir. 2005) (citing **Hurt v. Dow Chemical Co.**, 963 F.2d 1142, 1145-46 (8th Cir. 1992)). Consequently, a district court lacks diversity jurisdiction over a removed case in which one of the defendants is a citizen of the forum state. **Hurt**, 983 F.2d at 1146; **Hinkle v. Norfolk Southern Ry. Co.**, No. 4:05cv1867 CAS, 2006 WL 2521445, *2 (E.D. Mo. Aug. 29, 2006). See also 14B Charles A. Wright, Arthur R. Miller, Edward H. Cooper, **Federal Practice and Procedure**, § 3723 (3d ed. 1998) ("Section 1441(b) explicitly provides, and the cases uniformly hold, that removal to federal court based on diversity of citizenship is available only if *none* of the parties in interest properly joined and served as a defendant is a citizen of the state in which the action is brought . . .").

Clearly, remand is appropriate.

Title 28 U.S.C. § 1447(c) provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." "Absent unusual circumstances, courts may award attorneys' fees under 28 U.S.C. § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." **Martin v. Franklin Capital Corp.**, 546 U.S. 132, 141 (2005). An award of fees is within this Court's discretion, "with no heavy congressional thumb on either side of the scales." **Id.** Having reviewed Plaintiff's two-page motion and BJC's response, the Court declines to award Plaintiff attorney's fees. Additionally, Plaintiff does not set forth any costs she incurred in the removal of this case.

Accordingly,

IT IS HEREBY ORDERED that the motion for remand of Sue Cantrall is **GRANTED**. [Doc. 6]

IT IS FURTHER ORDERED that Clerk of Court is to remand this case to the Circuit Court for the Twenty-Second Judicial Circuit (St. Louis City) for the State of Missouri for lack of subject matter jurisdiction. See 28 U.S.C. § 1447(c).

/s/ Thomas C. Mummert, III
THOMAS C. MUMMERT, III
UNITED STATES MAGISTRATE JUDGE

Dated this 24th day of May, 2011.